

118 CMR 2.00: DEFINITIONS

Section

2.01: Scope and Purpose

2.02: Meaning of Terms

2.01: Scope and Purpose

118 CMR 2.00 provides definitions for terms frequently used in M.G.L. c. 19C and 118 CMR. The terms are based on M.G.L. c. 19C and Disabled Persons Protection Commission usage common to the implementation of the Commission's duties and obligations.

The terms used in 118 CMR have the meanings ascribed in M.G.L. c. 19C unless otherwise specified in 118 CMR 2.00, elsewhere in 118 CMR, or unless the context otherwise requires. In any event no term shall be given a meaning that is either inconsistent with the manifest intent of M.G.L. c. 19C or repugnant to its context.

2.02: Meaning of Terms

Abuse - an act or omission, which is not self-abuse, and which results in serious physical or serious emotional injury to a person with a disability; provided, however, that no person shall be considered to be abused for the sole reason that such person is being furnished or relies upon treatment in accordance with the tenets and teachings of a church or religious denomination by a duly accredited practitioner thereof; nor for the sole reason that consistent with the stated or implied wishes of a competent person or a duly appointed representative of an incompetent person he/she is not receiving medical treatment or care. It shall be considered an accident and not abuse when a person with a disability incurs an injury and the injury at the time it is incurred:

- (a) is not the result of a caretaker's negligent act;
- (b) is not the result of a caretaker's reckless act;
- (c) is caused by a caretaker's application of an appropriate degree of physical force given the circumstances; or
- (d) is caused by a caretaker's good faith attempt to prevent physical injury, pain or serious emotional injury to the person with a disability.

Abuse Per Se - the acts or omissions of a caretaker that include or result in the following regardless of whether a serious physical injury or serious emotional injury is manifested: a pattern of touching neither required nor appropriate for tending to the safety and welfare of a person with a disability; or any of the un-assented to sexual activities included within the definitions of Sexual Abuse or Sexual Exploitation; or the withholding of adaptive aids used by the person with a disability provided that said withholding is unrelated to that person's safety, care or treatment; or the intentional, wanton or reckless application of a physical force in a manner that inflicts physical pain or serious emotional injury as determined by an evaluation of the totality of the circumstances. In instances of a person with a disability who is unable to express or demonstrate a reaction to physical pain or serious emotional injury, it is presumed that abuse exists; provided that, given the same set of factual circumstances the assigned investigator determines by a preponderance of the evidence that a reasonable man would have expressed or demonstrated a reaction to the physical pain or serious emotional injury inflicted. For purposes of 118 CMR 2.02: Abuse Per Se the term reasonable man shall mean "A person who in similar circumstances would exercise the qualities of attention, knowledge, intelligence and judgment which society requires of its members for the protection of himself and the interest of others."

Commentary. Abuse *per se* exists where the act, omission, or result is in and of itself so objectionable that the act, omission, or result itself is abusive regardless of whether there exists a manifestation of injury, either physical or emotional. Examples of the withholding of adaptive aids include, but are not limited to, prevention of access to and/or removal of means of communication, in the case of a deaf or hard-of-hearing person or other person with a disability with communication deficits or of apparatus to assist mobility, in the case of a person with a physical disability.

Act - a caretaker's intentional, reckless, or negligent action regardless of whether the act is performed with an intent to harm.

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Capacity to Consent - the ability of the person with a disability to make informed decisions concerning his or her own person or property, including but not limited, to whether or not to accept protective services or to engage in sexual activity.

Caretaker - any state agency or any individual responsible for the health and welfare of a person with a disability by providing for or directly providing assistance in meeting a daily living need regardless of the location within which such assistance occurs. Minor children and adults adjudicated incompetent by a court of law shall not be deemed to be caretakers.

Commission - the Disabled Persons Protection Commission

Commissioners - the Commissioners of the Disabled Persons Protection Commission.

Daily Living Needs - the essential requirements necessary to safeguard the well-being of a person with a disability and to maintain the physical and mental health and welfare of the person with a disability and the basic safe daily functioning of a person with a disability, including but not limited to, the provision of medical care for physical and mental health needs, assistance in personal hygiene, the provision of food, of clothing, of heated and ventilated habitable shelter, of transportation and protection from health and safety hazards.

Disabled Person - a person between the ages of 18 through 59, who is mentally retarded, as used in M.G.L. c. 123B, § 1, or who is otherwise mentally or physically disabled, and, such mental or physical disability prevents or restricts the individual's ability to provide for his own daily living needs; provided, however, that a person who is temporarily dependent upon a medically prescribed device or procedure to solely treat a transitory physical ailment or injury shall not be considered a disabled person for the purposes of M.G.L. c. 19C unless that person otherwise meets the definition of a disabled person. The term "person with a disability" may be used in place of the term "disabled person" without changing the meaning of either.

Disclosure of Documents - the right of the assigned investigator to inspect and copy any document required to be made available pursuant to M.G.L. c. 19C, § 5(1) including any document plainly not irrelevant to any matter under investigation pursuant to M.G.L. c. 19C and in the possession of any mandated reporter or any state agency or any other entity which employs a mandated reporter and which is acting as custodian of the documents; provided that a written request has been submitted by the assigned investigator.

Emergency - a situation involving the presence of imminent serious physical or serious emotional injury or both to a person with a disability that requires an immediate response to protect the individual with a disability from serious injury.

Emergency Protective Services - Emergency protective services are those services provided in response to an emergency situation to eliminate the presence of imminent serious physical or serious emotional injury or both to a person with a disability.

False Report - a report of abuse which at the time it is made is known by the reporter not to be true and is maliciously made for: the purpose of harassing, embarrassing or harming another person; the personal financial gain of the reporter; acquiring custody of the person with a disability; or the personal benefit of the reporter in any other private dispute involving a person with a disability. The term False Report does not include a report of abuse of a person with a disability that is made in good faith to the Commission and subsequently is unsubstantiated or screened out for lack of jurisdiction under M.G.L. c. 19C.

Formal Investigation - Any discretionary investigation conducted at the direction of the Commissioners pursuant to M.G.L. c. 19C, § 8 and 118 CMR 6.00 and that may also be known as a "Commissioners' Investigation."

Long-term Care Facility. - a convalescent home, nursing home, rest home, or charitable home for the aged licensed by the Department of Public Health under the provisions of M.G.L. c. 111, § 71.

2.02: continued

Mentally Disabled Person - an individual having a condition, not including mental retardation, causing mental dysfunction or emotional impairment as determined by a mental health professional. The term "person with a mental disability" may be used in place of the term "mentally disabled person" without changing the meaning of either.

Mentally Retarded Person - A person with substantial limitations in present functioning manifested by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more adaptive skills as delineated and more specifically defined in the regulations of the Department of Mental Retardation at 115 CMR 2.01: Mental Retardation. The term "person with mental retardation" may be used in place of the term "mentally retarded person" without changing the meaning of either.

Non-emergency - a situation of abuse that is not an emergency.

Omission - a caretaker's failure, whether intentional or not, to take action to protect a person with a disability or to provide for a person with a disability daily living needs to the degree that it causes serious physical or serious emotional injury or both of a disabled person including, but not limited to, causing harm to the physical or mental health or welfare of a person with a disability and failing to prevent another person from inflicting upon a person with a disability any activity included within the definitions of Abuse and Abuse Per Se.

Partially Dependent - a determination made by the Commission that as a result of a disability, a person with a disability is unable to meet some, but not all, of his/her daily living needs without the intervention of at least a single caretaker. Partial dependence is not established by the mere existence of a disability. Partial dependence is established by the existence of both a disability and the individual's partial inability to provide his/her daily living needs without assistance because of the underlying disability.

Physically Disabled Person - a person with a permanent or long-term physical impairment. The term "person with a physical disability" may be used in place of the term "physically disabled person" without changing the meaning of either.

Professional Capacity - The activities that are performed in conjunction with an individual's employment or volunteer service in which they may come in contact with persons with disabilities.

Commentary. The purpose of mandating certain professions to report instances of abuse is to require reports from those individuals who, as part of their employment, have contact with persons with disabilities and thus a greater opportunity to observe abuse or its effects. As a result, the mandate applies, as specifically stated in the statute, when the mandated reporter learns of or suspects abuse while actually working in a professional capacity.

Protective Services - the services arranged for or implemented by a protective service agency as designated by the Commission pursuant to M.G.L. c. 19C, § 3(d) and provided to a person with a disability who has been determined to be in a state of abuse or neglect. Protective Services include, but are not limited to, social casework, case management, arranging for medical/psychiatric evaluation, home care, day care, social service, health care and other services as may be required to insure that the person with a disability is protected from abuse or neglect and that the effects of abuse or neglect are remedied.

Reasonable Cause to Believe.

- (a) For purposes of reporting and screening abuse pursuant to M.G.L. c. 19C, §§ 4, 5(4) and 10, "reasonable cause to believe" is a threshold function of judgment triggered by a presentation of facts either directly observed or obtained from reliable sources that creates a suspicion that abuse exists.
- (b) For purposes of substantiating or un-substantiating the existence of abuse after investigation, "reasonable cause to believe" pursuant to M.G.L. c. 19C, §§ 5 and 8 is a basis for judgment that rests upon specific facts, either directly observed or obtained from reliable sources, which supports a belief that it is more likely than not that abuse exists.

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Records - all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, videotapes, digital files or other documentary material, regardless of physical form or characteristics, collected or generated as a result of a report or investigation of abuse or retaliation pursuant to M.G.L. c. 19C. Such records shall not be considered "public records" and the disclosure of the material and data contained therein shall be limited to the extent required by M.G.L. c. 19C, § 3 and M.G.L. c. 66A.

Referral Agency - an agency of the Commonwealth that receives from the Commission a report of abuse of a person with a disability in order to perform investigations, protective service assessments and to provide protective services pursuant to M.G.L. c. 19C, §§ 4, 5 and 6.

Reportable Condition - a serious physical or serious emotional injury incurred by a person with a disability and for which there is a reasonable suspicion to believe resulted from the act or omission of a caretaker, including, but not limited to, any activity included within the definitions of Abuse, and Abuse Per Se.

Screener - a Commission employee who determines the urgency and nature of each report of alleged abuse received by the Commission and who refers it for investigation pursuant to M.G.L. c. 19C, § 4 and 118 CMR.

Serious Emotional Injury - An injury to the intellectual functioning or emotional state of a person with a disability caused by either the verbal or nonverbal conduct of a caretaker, including but not limited to, coercion, harassment, the inappropriate isolation of a person with a disability from family, friends or regular activity, and verbal assault including but not limited to ridiculing, intimidating, yelling or swearing. A serious emotional injury is evidenced by an observable and measurable reduction in the person's ability to function from the person's customary range of performance or customary behavior including, but not limited to, a state of anxiety, fear, depression or withdrawal or the development of post-traumatic syndrome, including but not limited to, symptoms resulting from being forced to engage involuntarily in sexual activity.

Commentary. A serious emotional injury is determined by examining the effect of the act or omission by the caretaker(s) upon the ability to function of the person with a disability. Finding a reduction of function is not solely dependent upon the duration of the reduction. The fact that the resulting reduction of function from the person's customary range of performance or customary behavior does not extend for a particular period of time does not preclude a finding that a serious emotional injury has occurred. The length of time the reduction in function lasts must be evaluated in conjunction with the severity of the reduction in function in determining whether a serious emotional injury has occurred.

Serious Physical Injury - impairment of the physical condition of a person with disability including, but not limited to: death; brain damage; permanent disfigurement; any burn; fracture of any bone; subdural hematoma; intramuscular injury; bruising, abrasion, laceration or puncture of the skin; bleeding; impairment of a bodily system, function, limb or organ including human skin; bedsores or similar condition; or harmful symptoms resulting from the use of medication or chemicals without informed consent or appropriate authorization; or malnutrition or dehydration.

Sexual Abuse - occurs when a caretaker forces, tricks, threatens, coerces or otherwise engages a person with a disability or permits another person to force, trick, threaten, coerce or otherwise engage a person with a disability in an un-assented to sexual activity, including but not limited to, unwanted or inappropriate touching, kissing, touching of the clothed or unclothed inner thigh, breast, groin, buttock, anus, pubes or genitalia; or any un-assented to sex act including but not limited to sexual intercourse, sexually explicit photographing, exposure to sexually explicit material, activity or language and sexual exploitation. Sexual abuse also occurs when the person with a disability lacks the capacity to provide informed consent to such sexual activities or contact and has assented to engage in and is engaged in such activities or contact with another person. Sexual abuse does not include a touching which is part of a necessary examination, treatment or care by a caretaker acting within the scope of the practice or employment of the caretaker; the exchange of a brief touch or hug between the person with a disability and a caretaker for the purpose of reassurance, comfort, or casual friendship; or consensual touching between competent adults.

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Sexual Exploitation - any sexual activity between a caretaker and a person with a disability when the person with a disability does not consent or when the person with a disability lacks the capacity to consent or is incapable of resisting or declining to consent to the sexual activity due to his/her disability, fear of retribution or hardship, or the inequality of position and power between the person with a disability and the caretaker. Said sexual activity is for the purpose of arousing or satisfying the sexual desires and needs of the caretaker, and includes, but is not limited to: kissing, touching of the clothed or unclothed inner thigh, breast, groin, buttock, anus, pubes or genitalia; or any sex act including, but not limited to, sexual intercourse. Sexual exploitation does not include a touching which is part of a necessary examination, treatment or care by a caretaker acting within the scope of the practice or employment of the caretaker; the exchange of a brief touch or hug between the person with a disability and a caretaker for the purpose of reassurance, comfort, or casual friendship; or consensual touching between competent adults.

Special Investigative Unit - the investigative unit within the Commission to which are assigned state police to coordinate and conduct investigations of all reports of abuse received by the Commission in connection with which there is an allegation of criminal conduct pursuant to M.G.L. c. 19C, §§ 3(i) and 4.

Staff Investigation - an investigation conducted by the staff of the Commission that is not a "formal/Commissioners' Investigation" pursuant to M.G.L. c. 19C, § 8 and 118 CMR 6.00.

State Agency - any agency of the Commonwealth that provides services or treatment to persons with disabilities and private agencies or other entities providing any services or treatment pursuant to a contract or agreement including, but not limited to, a contract or agreement for reimbursement, with an agency of the Commonwealth.

Wholly Dependent - a determination made by the Commission that as a result of his/her disability, a person with a disability is completely unable to meet all of his/her daily living needs without the intervention of at least a single caretaker. The state of being wholly dependent is not established by the mere existence of a disability. The state of being wholly dependent is established by the existence of both a disability and the individual's complete inability to provide for all of his/her daily living needs without assistance because of his/her underlying disability.

REGULATORY AUTHORITY

118 CMR 2.00: M.G.L. c. 19C, §§ 1 and 3(b).

NON-TEXT PAGE